

Proposed Rule
LSA Document #08-131

DIGEST

Adds [312 IAC 6.3](#) to assist with the application of P.L.231-2007 to [IC 14-25-2](#) with respect to water withdrawal contracts for water supply purposes from the water supply in reservoir impoundments that are financed by the state. Effective 30 days after filing with the Publisher.

[IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses](#)

[312 IAC 6.3](#)

SECTION 1. [312 IAC 6.3](#) IS ADDED TO READ AS FOLLOWS:

ARTICLE 6.3. WATER WITHDRAWAL CONTRACTS FROM STATE RESERVOIRS

Rule 1. Applicability

[312 IAC 6.3-1-1](#) Purpose and scope

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 1. (a) This article assists with the application of P.L.231-2007 to [IC 14-25-2](#).

(b) The article applies to contracts for the withdrawal or release of water supply storage from a reservoir, including provisions for the following:

- (1) The review of contract proposals.
- (2) The administration of contracts.
- (3) The expiration or other termination of contracts.

(c) A person must not withdraw or obtain the release of water from a reservoir except as provided in:

- (1) the terms of a contract; or
- (2) an exemption from a contract requirement under [IC 14-25-2](#) and this article.

(Natural Resources Commission; [312 IAC 6.3-1-1](#))

[312 IAC 6.3-1-2](#) Applicability to contracts for water withdrawals

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 2. (a) This article governs the procedures for, and the substance of, consideration of any contract proposal made to the state and submitted to the division after February 28, 2009, for the withdrawal or release of water from the water supply storage of a reservoir.

(b) A contract for the withdrawal or release of water supply storage from a reservoir, which was entered by the state before March 1, 2009, is governed by the terms of the contract and by any statute or rule in effect when the contract was entered.

(c) Upon the expiration or termination of a contract governed by subsection (a) or (b), any water withdrawal or taking of a release must cease unless a new contract is approved under [IC 14-25-2](#) and this

article.

(Natural Resources Commission; [312 IAC 6.3-1-2](#))

[312 IAC 6.3-1-3](#) Administration by the department's division of water

Authority: [IC 14-10-2-4](#); [IC 14-25-1-11](#)

Affected: [IC 14-10-2-3](#); [IC 14-25-2](#)

Sec. 3. (a) The division shall:

- (1) serve as the point of contact; and
- (2) coordinate the administrative, professional, and technical functions of this article.

(b) Subject to [IC 14-10-2-3](#), the division director shall issue any order appropriate to implementation of this article.

(Natural Resources Commission; [312 IAC 6.3-1-3](#))

Rule 2. Definitions

[312 IAC 6.3-2-1](#) Definitions applicable to water withdrawal contracts

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-8](#); [IC 14-25-2](#)

Sec. 1. This rule provides definitions that:

- (1) apply to this article; and
- (2) are in addition to those set forth in:
 - (A) [IC 14-8](#);
 - (B) [IC 14-25-2](#); and
 - (C) [312 IAC 1](#).

(Natural Resources Commission; [312 IAC 6.3-2-1](#))

[312 IAC 6.3-2-2](#) "Authorizing legislation" defined

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#); [IC 14-26-4-12](#)

Sec. 2. "Authorizing legislation" means the federal or state legislation that provides legal authority for the construction or maintenance of a reservoir. Examples are as follows:

- (1) 44 U.S.C. 390b to 44 U.S.C. 390f.
- (2) [IC 14-26-4-12](#).
- (3) With respect to a contract for water withdrawal or a release of water described in [312 IAC 6.3-1-2](#), any federal or state legislation cited in the contract.

(Natural Resources Commission; [312 IAC 6.3-2-2](#))

[312 IAC 6.3-2-3](#) "Corps of engineers" defined

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 3. "Corps of engineers" refers to the U.S. Army Corps of Engineers.

(Natural Resources Commission; [312 IAC 6.3-2-3](#))

[312 IAC 6.3-2-4](#) "Division" defined

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 4. "Division" refers to the division of water of the department unless another division of the department is specified.

(Natural Resources Commission; [312 IAC 6.3-2-4](#))

[312 IAC 6.3-2-5](#) "Minimum quantities of stream flow" defined and determined

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 4-21.5-3-5](#); [IC 14-25-2](#); [IC 14-25-7-14](#)

Sec. 5. (a) Except as provided in this section, "minimum quantities of stream flow" refers to an order, which implements the standards of [IC 14-25-7-14](#), determined at a point of discharge of a reservoir's outlet works.

(b) With respect to the following reservoirs, "minimum quantities of stream flow" refers to the following:

- (1) For Brookville Lake, forty (40) cubic feet per second above elevation seven hundred thirteen (713) feet, National Geodetic Vertical Datum of 1929 (NGVD-29).
- (2) For Hardy Lake, five-tenths (0.5) cubic feet per second.
- (3) For Monroe Lake, fifty (50) cubic feet per second whenever the reservoir pool is above elevation five hundred fifteen (515) feet, National Geodetic Vertical Datum of 1929 (NGVD-29). When lower than this elevation, the minimum quantities of stream flow are as determined by the corps of engineers.
- (4) For Patoka Lake, five (5) cubic feet per second whenever the reservoir pool is above elevation five hundred six (506) feet, National Geodetic Vertical Datum of 1929 (NGVD-29). When lower than this elevation, the minimum quantities of stream flow are as determined by the corps of engineers.

(c) A person may petition the division director to determine an impoundment, not listed in subsection (b), is a reservoir subject to this article. If the petition is granted, the division director shall also determine the minimum quantities of stream flow for the reservoir. A determination under this subsection is a determination of status under [IC 4-21.5-3-5](#).

(Natural Resources Commission; [312 IAC 6.3-2-5](#))

[312 IAC 6.3-2-6](#) "Reservoir" defined

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 6. "Reservoir" means an impoundment that:

- (1) contains water supply storage; and
- (2) was financed, or parts of which were financed, by the state.

(Natural Resources Commission; [312 IAC 6.3-2-6](#))

[312 IAC 6.3-2-7](#) "Withdrawal or release of water" defined

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 7. "Withdrawal or release of water" means the:

- (1) physical removal of water from or beneath a reservoir; or**
- (2) outflow of water from a reservoir to maintain stream flow.**

(Natural Resources Commission; [312 IAC 6.3-2-7](#))

Rule 3. Procedures

[312 IAC 6.3-3-1](#) Request for water withdrawal or release from a reservoir

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2-2](#)

Sec. 1. (a) A person that seeks to contract with the commission for the:

- (1) provision of certain minimum quantities of stream flow; or**
- (2) sale of water on a unit pricing basis;**

under [IC 14-25-2-2](#), must submit a written request to the division under this article.

(b) A written request under subsection (a) must be completed and must include the following information:

- (1) The name, address, e-mail address, and telephone number of the following:**

(A) The person that would enter the contract.

(B) At least one (1) individual to serve as a point of contact for the person that would enter the contract.

(2) If another person is acting for the person described in subdivision (1), the same information for the other person as is described in subdivision (1).

(3) The location where any withdrawal or release from a reservoir would occur.

(4) The proposed use or uses of the withdrawal or release.

(5) The location of the proposed use or uses described in subdivision (4).

(6) The proposed daily limit for the withdrawal or release of water (or pump capacity, if the limit is proposed to be based upon a pump capacity).

(7) The proposed term, in years, of the contract and a justification for the proposed term.

(8) The proposed method for measuring the withdrawal or release of water.

(9) A summary of alternative water supply sources that were considered.

(10) A justification for why the reservoir is the most economic or feasible supply source.

(11) A conservation plan.

(c) A written request under subsection (a) is not complete until the person submits, as part of the application:

(1) a contingency plan that describes the alternatives the person will use if the withdrawal or release of water from the reservoir is restricted due to a drought alert described in [312 IAC 6.3-5-2](#); or

(2) a statement that the person agrees to withstand the results of not being able to receive water from the reservoir.

(d) A contract shall not be executed unless the:

(1) contingency plan is feasible; or

(2) person seeking the contract agrees to withstand the results of not being able to receive water from the reservoir.

(Natural Resources Commission; [312 IAC 6.3-3-1](#))

[312 IAC 6.3-3-2](#) Notice by division of water to interested persons

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2-2.5](#)

Sec. 2. The division shall provide notice as follows:

(1) Not later than thirty (30) days after receiving a complete request under section 1 of this rule, provide notice by certified mail to the persons described in [IC 14-25-2-2.5\(c\)](#).

(2) As soon as practicable, cause notice by publication in each county described in [IC 14-25-2-2.5\(f\)](#).

(Natural Resources Commission; [312 IAC 6.3-3-2](#))

[312 IAC 6.3-3-3](#) Public meeting

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 4-21.5](#); [IC 14-25-2-2.5](#)

Sec. 3. (a) The division director shall appoint a department employee to serve as hearing officer for any public meeting under [IC 14-25-2-2.5\(h\)](#).

(b) The public meeting shall include the following:

(1) A presentation by the department describing the following:

(A) The nature of the pending request.

(B) The process by which the commission will determine whether to enter into a contract with the person making the request. The process shall reference [IC 14-25-2](#) and this article.

(2) An opportunity for public comment on the pending request.

(c) A hearing officer shall conduct the public meeting in a manner that is best suited to the solicitation of public comments in support of fact-finding. Neither the rules of evidence nor [IC 4-21.5](#) apply.

(d) A hearing officer shall maintain a record of the public meeting to assist in providing written recommendations to the advisory council. Any other person may also cause a recording to be made of the public meeting, but the official record is maintained by the hearing officer.

(Natural Resources Commission; [312 IAC 6.3-3-3](#))

[312 IAC 6.3-3-4](#) Advisory council report summary and recommendations

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 5-14-1.5](#); [IC 14-25-2-2](#)

Sec. 4. (a) As soon as practicable following the public meeting, the hearing officer shall deliver a written summary of the meeting and any recommendations to the advisory council.

(b) The written summary required under subsection (a) shall, in anticipation of the memorandum required under [IC 14-25-2-2\(c\)](#), also consider the effect that exercise of the contract may have on recreational facilities.

(c) The advisory council shall consider the hearing officer's written summary and recommendations during a public meeting held under [IC 5-14-1.5](#).

(d) The advisory council is not limited to the written summary and recommendations of the hearing officer, but may also consider the following:

(1) Recommendations of the division of state parks and reservoirs or another division of the department that manages the reservoir from which the water would be withdrawn or released.

(2) Recommendations from a federal, state, or local agency with expertise regarding water usage and supply.

(3) Information received before or during an advisory council meeting.

(e) Not later than thirty (30) days after the final public meeting under section 3 of this rule, the advisory council shall submit to the commission a report summarizing the public meeting or meetings. The report may be accompanied by recommendations that duplicate, augment, or contrast with those of the hearing officer.

(Natural Resources Commission; [312 IAC 6.3-3-4](#))

[312 IAC 6.3-3-5](#) Commission action on contract and subsequent approvals

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 4-21.5-2-5](#); [IC 5-14-1.5](#); [IC 14-25-2-2](#)

Sec. 5. (a) During a public meeting under [IC 5-14-1.5](#), the commission may deliberate as to whether to approve a person's written request for the:

- (1) provision of certain minimum quantities of stream flow; or
- (2) sale of water on a unit pricing basis.

(b) The commission shall include in its deliberations a consideration of the following:

- (1) The standards provided by [IC 14-25-2](#) and this article.
- (2) The report of the advisory council submitted under section 4(e) of this rule.
- (3) Other statements or documents the commission elects to receive before or during the meeting.

(c) Consistent with subsection (b), the commission:

- (1) shall determine to approve, condition, or deny a person's request; and
- (2) may elect to execute a contract under [IC 14-25-2-2\(a\)\(1\)](#).

If the commission elects to execute a contract, the contract shall be delivered to the division. A determination under this subsection is governed by [IC 4-21.5-2-5\(11\)](#).

(d) Within twenty (20) days after receiving a contract delivered under subsection (c), the division shall submit the memorandum required under [IC 14-25-2-2\(c\)\(2\)](#) to the governor for the governor's consideration.

(e) A contract executed by the commission under subsection (c) is subject to approval by each of the following:

- (1) The attorney general.
- (2) The governor.
- (3) The person desiring the use.

(Natural Resources Commission; [312 IAC 6.3-3-5](#))

Rule 4. Contract Terms and Conditions

[312 IAC 6.3-4-1](#) Water allocation factors

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-1-3](#); [IC 14-25-2](#)

Sec. 1. This section establishes the following factors that the commission shall consider in reviewing, and for acting upon, a person's written request for the provision of certain minimum quantities of stream flow or for the sale of water on a unit pricing basis:

- (1) The terms, conditions, and purposes of the authorizing legislation.
- (2) The likelihood of adverse effects to:
 - (A) public safety;
 - (B) the environment;
 - (C) navigation; or
 - (D) recreation.

- (3) The availability of another source of water to the person making the request.
- (4) The proximity to the reservoir of any person that would receive water from the person making the request.
- (5) Water allocation priorities for use of the water as follows:
 - (A) First priority is for the use of water for domestic purposes as described in [IC 14-25-1-3](#).
 - (B) Second priority is for the use of health and safety.
 - (C) Third priority is for power production that meets the contingency planning provisions of the drought alerts described in [312 IAC 6.3-5-2](#).
 - (D) Fourth priority is for industry and agriculture (not described in clause (A), (B), or (C)) that meets the contingency planning provisions of the drought alerts described in [312 IAC 6.3-5-2](#).
 - (E) Fifth priority is for a purpose described in clause (C) or (D) that does not meet the contingency planning provisions of the drought alerts described in [312 IAC 6.3-5-2](#).
 - (F) Sixth priority is for any other purpose.
- (6) If the person making the request provides water to others (and the others provide for uses that include multiple priorities under subdivision (5)), the extent to which the person demonstrates an ability to implement the priorities for water allocation that are set by subdivision (5).

(Natural Resources Commission; [312 IAC 6.3-4-1](#))

[312 IAC 6.3-4-2](#) Duration of a contract

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#); [IC 14-25-7-11](#)

Sec. 2. (a) The commission shall not approve a contract that covers a period that is longer than authorized by a plan for water resource management approved under [IC 14-25-7-11](#).

(b) In determining the duration of a contract, the commission may consider the water allocation factors in section 1 of this rule.

(c) Notwithstanding subsections (a) and (b), a contract entered under [IC 14-25-2](#) and this article shall not cover a period of more than fifty (50) years.

(Natural Resources Commission; [312 IAC 6.3-4-2](#))

Rule 5. Drought Alerts and Emergency Measures

[312 IAC 6.3-5-1](#) Application of rule for drought alerts and emergencies

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 1. Unless exempted by [312 IAC 6.3-1-2\(b\)](#), this rule governs any contract for a water withdrawal or release from a reservoir that occurs during a drought alert or another emergency.

(Natural Resources Commission; [312 IAC 6.3-5-1](#))

[312 IAC 6.3-5-2](#) Drought alerts

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 2. (a) The director of the department may declare a drought alert for a designated reservoir based upon a drought emergency plan approved by the commission. A drought alert shall apply the Palmer Hydrologic Drought Index or exceedance values of regionalized monthly average stream flows.

(b) From least severe to most severe, a drought alert shall be declared as a:

- (1) drought watch;
- (2) drought warning; or
- (3) drought emergency.

(c) Contingency plans shall be specified for a drought alert in any of the following:

- (1) A drought emergency plan approved by the commission.
- (2) The terms of a particular drought alert.
- (3) A contract for the withdrawal of water or the release of water from a reservoir.

(d) The stages of a drought alert and their associated criteria are as follows:

- (1) A declaration of a drought watch is appropriate when either the:
 - (A) Palmer Hydrologic Drought Index is -2.00 to -2.99; or
 - (B) percentage of time flow is equaled or exceeded seventy-five percent (75%) to ninety percent (90%).
- (2) A declaration of drought warning is appropriate when either the:
 - (A) Palmer Hydrologic Drought Index is -3.00 to -3.99; or
 - (B) percentage of time flow is equaled or exceeded ninety percent (90%) to ninety-five percent (95%).
- (3) A declaration of drought emergency is appropriate when either the:
 - (A) Palmer Hydrologic Drought Index is -4.00 or less; or
 - (B) percentage of time flow is equaled or exceeded more than ninety-five percent (95%).

(Natural Resources Commission; [312 IAC 6.3-5-2](#))

[312 IAC 6.3-5-3](#) Emergency measures to protect life or property

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 3. (a) The department and the corps of engineers may take the emergency measures they individually or jointly determine necessary in the operation of a reservoir, including lowering the elevation of the water below an elevation at which water may be withdrawn or released under a contract, to protect life or property.

(b) Notwithstanding subsection (a), the department and the corps of engineers may enter any agreement between them as to which governmental entity shall exercise the authority described in subsection (a).

(c) A contract entered under this article for the withdrawal or release of water from a reservoir is subordinate to an exercise of authority under this section.

(d) No third person has a right of action against the department or the corps of engineers based upon an exercise of authority under this section.

(Natural Resources Commission; [312 IAC 6.3-5-3](#))

Rule 6. Enforcement

[312 IAC 6.3-6-1](#) Enforcement

Authority: [IC 14-10-2-4](#); [IC 14-25-2-5](#)

Affected: [IC 14-25-2](#)

Sec. 1. (a) The secretary of the commission may suspend or revoke any contract for the withdrawal or release of water where the person obtaining the contract:

- (1) Breaches the contract.
- (2) Violates [IC 14-25-2](#) or this article.
- (3) For any improvement constructed or caused by the person to be constructed with respect to the withdrawal or release of water or for the subsequent distribution of the water, fails to exercise due diligence to require another person using the improvement to conduct activities consistently with:
 - (A) the contract;
 - (B) [IC 14-25-2](#); and
 - (C) this article.

(b) The remedy described in subsection (a) is in addition to any other remedy provided by law.

(Natural Resources Commission; [312 IAC 6.3-6-1](#))

[Notice of Public Hearing](#)

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